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In the Supreme Court of the United States

OCTOBER TERM, 1993

SCIENTIFIC-ATLANTA, INC., PETITIONER

v.

RUSSELL HENDERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 27A(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1(a) (Supp. III 1991), violates the separation of powers doctrine.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-16a, is reported at 971 F.2d 1567. The opinion of the district court, Pet. App. 17a-34a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1992. A petition for rehearing was denied on February 10, 1993. Pet. App. 35a-36a. On May 3, 1993, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 2, 1993, and the petition was filed on June 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. III 1991), provides:

> (a) *Effect on pending causes of action.*—The limitation period for any private civil action implied under section 78j of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on dismissed causes of action.*—Any private civil action implied under Section 78j of this title that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

STATEMENT

1. In September 1988, Russell Henderson filed a private securities fraud class action against petitioner on behalf of purchasers of petitioner's common stock between January 1, 1981, and August 31, 1983. The complaint alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5,

17 C.F.R. 240.10b-5, as well as pendent state law claims. Pet. App. 2a.

Petitioner moved for summary judgment, arguing that the statute of limitations had run on the plaintiffs' Section 10(b) claim. To determine the applicable statute of limitations, the district court, in compliance with well-settled circuit law, borrowed from Georgia law a two-year limitations period that ran from the date of discovery.[1] Applying that limitations period, the court determined that the plaintiffs' action was timely. Pet. App. 2a.

While the parties were awaiting trial, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), holding that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the 1934 Act, 15 U.S.C. 78i(e). Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. *Lampf* was decided on June 20, 1991. On the same day, this Court also decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which it disallowed the use in civil litigation of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it

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[1] See *Smith* v. *Duff & Phelps, Inc.*, 891 F.2d 1567, 1569-1570 (11th Cir. 1990); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986); *Diamond* v. *Lamotte*, 709 F.2d 1419 (11th Cir. 1983). Because the private action under Section 10(b) is an implied cause of action for which Congress had not enacted a statute of limitations, courts had long followed a practice of borrowing a limitations period from other sources. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 n.29 (1976).

is announced but not applying it to other pending suits.

Based on *Lampf*[2] and *Beam*, petitioner renewed its motion for summary judgment. Applying the limitations period adopted in *Lampf*, the district court agreed that the Section 10(b) claim was time-barred and granted the motion. The plaintiffs appealed. Pet. App. 3a.

2. While the appeal was pending, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. III 1991), to the 1934 Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Subsection (a) of Section 27A makes applicable, to Section 10(b) actions that were pending when *Lampf* was decided, the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. 15 U.S.C. 78aa-1(a) (Supp. III 1991).

Notwithstanding the enactment of Section 27A, petitioner urged the court of appeals to affirm. First, petitioner argued that Section 27A does not require application of the Georgia statute of limitations that had governed before *Lampf*. The court of appeals rejected that claim, holding that the clear language of Section 27A requires application of the pre-*Lampf* limitations period.[3] Pet. App. 6a-7a. Next, petitioner argued that, if Section 27A has the effect of displacing the rule announced in *Lampf*, it is unconstitutional.

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[2] The Court applied its holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting).

[3] Petitioner does not renew its statutory arguments in this Court. Pet. 7 n.8.

The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Section 27A, Pet. App. 4a n.1, and the court of appeals rejected petitioner's constitutional claims.

The court held that Section 27A(a) does not infringe the separation of powers by interfering with the judgments of courts. The court explained that *Lampf* constituted an interpretation of the Securities Exchange Act of 1934, and Congress had amended the statute in response to *Lampf* to change the governing law. Pet. App. 7a-8a. Thus, "Section 27A is a classic example of Congress's practice of 'overruling' a statutory construction by the Supreme Court." *Id.* at 8a n.4. Relying on *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992), the court rejected petitioner's contention that Section 27A(a) is an attempt to compel courts "to reach an outcome which is contrary to the law." Pet. App. 8a.

The court of appeals also held that Section 27A(a) does not violate the Due Process Clause. The court concluded that the provision was an appropriate mechanism for Congress to specify the law with respect to limitations periods for cases affected by *Lampf*, and that it did not draw irrational distinctions between litigants in violation of equal protection principles.[4] Pet. App. 11a-14a.

Accordingly, the court of appeals vacated the judgment and remanded with directions to reinstate respondents' Section 10(b) claim.[5] Pet. App. 1a-14a.

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[4] Petitioner does not renew its due process claims in this Court. Pet. (i).

[5] Judge Wellford dissented from the majority's holding on the separation of powers issue. Citing several district court decisions addressing the constitutionality of Section 27A, he

ARGUMENT

Petitioner contends (Pet. 8-20) that Section 27A(a) violates the separation of powers. Six courts of appeals have rejected that claim, and none has accepted it.[6] As petitioner concedes (Pet. 9), there is

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expressed the view that "Congress infringed upon judicial authority by setting out specific rules of decision in pending cases," in violation of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Pet. App. 16a & n.1.

[6] This was the first court of appeals case to reach the constitutional issue. Pet. App. 7a. Since then, Section 27A has been upheld by the other five circuits that have addressed its constitutionality with respect to pending cases. See *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992) (reinstating suit when case was pending by virtue of the fact that 90-day certiorari period had not yet expired), cert. denied, 113 S. Ct. 1841 (1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) (cases were pending because they had not "completed their journey through the appellate process"); *Berning* v. *A.G. Edwards & Sons*, 990 F.2d 272, 279 (7th Cir. 1993) (case was pending on appeal when Section 27A was enacted); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269, 273, n.11 (1st Cir. 1993) (noting that no final judgment of dismissal had been entered by the district court); *Cooke* v. *Manufactured Homes, Inc.*, No. 93-1005 (4th Cir. July 9, 1993), slip. op. 13-14 (limitations issue raised by defendant on appeal as alternative ground for judgment in its favor). The issue is pending in *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (2d Cir. argued Dec. 21, 1992); *Freeman* v. *Laventhal & Horwath*, Nos. 92-6123 & 92-6191 (6th Cir.); and *Johnston* v. *CIGNA Corp.*, No. 92-1186 (10th Cir.).

In *TGX Corp.* v. *Simmons*, No. 92-3375 (5th Cir. July 20, 1993), the Fifth Circuit sustained the constitutionality of Subsection (b) of Section 27A, which provides for the reinstatement of cases that were finally *dismissed* as time barred prior to the enactment of Section 27A, if the action would have been timely under the law of the jurisdiction prior to *Lampf*. The

no circuit split on the constitutionality of Section 27A(a). Because the decision below is correct and consistent with the decisions of this Court, this Court's review is not warranted.

1. Petitioner argues (Pet. 11-15) that Section 27A(a) invades the judicial province by revising a judgment of this Court and by directing the courts to reach particular results in identified cases. The linchpin of that claim is that Section 27A(a) does not work a change in the substantive law, but simply requires courts to ignore the holdings of *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), and *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in specified cases. Pet. 14. Petitioner's premise is incorrect.

As the court of appeals explained, "section 27A does implement a change in the law; it amends the Securities Exchange Act to provide the statute of limitations for private causes of action under section 10(b) that were filed by June 19, 1991." Pet. App. 11a. When Section 27A was enacted, the limitations period

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Sixth Circuit recently reached a contrary result regarding Subsection (b) in *Plaut* v. *Spendthrift Farm*, No. 92-5591 (6th Cir. Aug. 3, 1993). The Solicitor General has authorized the filing of a petition for rehearing *en banc* in *Plaut*. As a result, there is not a conclusive circuit conflict regarding the constitutionality of Subsection (b). In any event, such a conflict would not weigh in favor of certiorari in this case, which involves Subsection (a). As Judge Keith explained in his separate opinion in *Plaut*, the rationale invoked by the Sixth Circuit—that Subsection (b) effectively revises a final federal judgment dismissing a case—does not apply to cases pending on appeal when Section 27A was passed because those cases had not yet become "final." *Plaut* v. *Spendthrift Farm*, No. 92-5591, slip op. at 26-28 (Keith, J., concurring in part and dissenting in part).

for private Section 10(b) claims was the federal rule borrowed from Section 9(e) adopted by this Court in *Lampf*. Section 27A changes the statute of limitations for cases filed prior to *Lampf* by replacing the borrowed federal rule with the limitations period previously applicable in each jurisdiction. As this Court noted in *Musick, Peeler & Garrett* v. *Employers Ins.*, 113 S. Ct. 2085, 2089 (1993), "Congress did no more than direct the applicable 'limitation period for any private civil action implied under section 78j(b) of this title [§10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*].'" Thus, Section 27A does not revise a judgment of this Court; it belongs to the large category of statutes that alter the law in response to judicial interpretation.[7] See *West Virginia Univ. Hosp., Inc.* v. *Casey*, 111 S. Ct. 1138, 1154-1155 (1991) (Stevens, J., dissenting); Esk-

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[7] Petitioner suggests that Congress did not change the law because it neither expressed disagreement with the legal analysis in *Lampf* nor altered Sections 10(b) and Section 9(e) of the 1934 Act. Section 27A, however, changes the limitations period read into Section 10(b) by *Lampf*. After enactment of Section 27A, Section 27A (and no other law) prescribes the limitations period for covered Section 10(b) cases. There is no requirement that Congress express disagreement with a court's legal analysis in order to justify reinstatement of a prior interpretation. Nor is there a requirement that Congress specifically repeal or amend a preexisting provision in order to modify the law. In fact, in this case it would have been impossible to do so, given that no express statute of limitations existed for Section 10(b) actions. Petitioner asserts (Pet. 11-12) that Section 27A(a) "creates a retroactive legislative exception to the application of the laws of the United States," but gives no reason why the so-called "exception" that Congress legislated is not part of "the laws of the United States."

ridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 424-441 (1991) (listing recent examples).

Petitioner claims (Pet. 14) that *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), supports its contention that Section 27A(a) unconstitutionally directs the courts to reach specific results in particular cases. That contention is incorrect. Section 27A(a) does not tell the courts how to decide the merits of any particular Section 10(b) claim, nor does it "require courts to make any particular findings of fact or applications of law to fact." Pet. App. 11a. The ultimate outcome of any case to which Section 27A(a) applies depends on a court's determination of many issues other than the statute of limitations. Even as to the limitations issue, a court will apply the relevant limitations period in light of the particular circumstances of the case—for example, where tolling principles are applied, by determining when the fraud was or should have been discovered. In sum, the courts, not Congress, determine whether a particular claim is timely and meritorious under Section 27A(a).

In *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992), the Court rejected a similar *Klein* challenge to a law that altered the standards for complying with certain environmental statutes at issue in pending litigation. Petitioner's claim is foreclosed by the same analysis. Although petitioner asserts (Pet. 14 n.21) that Section 27A(a) directs specific outcomes because it covers only those plaintiffs who had reached the point of filing suit, rather than all potential plaintiffs who had relied on pre-*Lampf* law, Section 27A(a) is far more general in its operation than was the statute at issue in *Robertson*,

which was directed at only two pending cases. 112 S. Ct. at 1411, 1414. And, while the statute in *Robertson* changed the law only by "determin[ing] and direct[ing]" that specified actions would be deemed to satisfy the requirements of particular statutes, 112 S. Ct. at 1413, Section 27A explicitly designates the sources for the applicable limitations period for covered Section 10(b) cases. In light of *Robertson*'s conclusion that the statute in that case modified the underlying law sufficiently to pass muster under *Klein*, Section 27A(a) necessarily satisfies *Klein* as well.

Petitioner asserts (Pet. 16-17) that *Robertson* is distinguishable because the statute in that case had prospective effects, while Section 27A is purely retrospective. *Robertson* holds, however, that when Congress "amend[s] applicable law," its action does not implicate the principles underlying *Klein*. 112 S. Ct. at 1414. Petitioner cites no authority for the view that Congress cannot "amend applicable law," *ibid.*, through a retrospective statute.[8] Here, Congress changed the law retroactively in order to protect the reliance interests of plaintiffs who had timely filed actions under pre-*Lampf* precedents. To achieve that purpose it was not necessary for Congress to enact a

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[8] Petitioner's reliance (Pet. 17 n.24) on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), is misplaced; that case holds that it is permissible under the Due Process Clause for Congress to legislate retroactively. Accord *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2287 (1993); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Nothing in *Usery* suggests that retroactive legislation raises separation of powers concerns.

prospective modification of the relevant limitations period.[9]

Quite apart from the fact that Section 27A(a) works a change in the underlying law, that provision does not violate *Klein* because *Klein* does not cast doubt on the validity of statutes (such as Section 27A(a)) that merely withdraw a procedural defense and allow the adjudication of cases on the merits. In *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 402-407 (1980), the Court rejected a *Klein* challenge to a provision that waived the government's defense of res judicata and allowed further adjudication of a claim, but did not attempt to dictate the outcome of the adjudication. The Court explained that the waiver of "the defense of res judicata so that a legal claim could be resolved on the merits" does not constitute a congressional effort "to control the * * * ultimate

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[9] Petitioner errs in suggesting (Pet. 9, 18) that, if *Robertson* is not read more narrowly, there would be no adequate check on Congress's power to revise this Court's judgments or to invade "core judicial functions." With respect to the revision of judgments, petitioner did not obtain a final and unreviewable judgment from this Court or any other court holding that respondent's Section 10(b) claim against it is time-barred; petitioner's case was still pending on appeal when Section 27A was enacted. Accordingly, this case does not present the issue of whether Congress may announce a rule of law that "requires reversal of a judgment of this Court." Pet. 18. And, with respect to the purported invasion of "core judicial functions," there is no invasion when Congress changes the law applicable to a pending case; since *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), courts have honored the legislative will by applying the new rule. See also *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990) (discussing standards for determining whether new rule is applicable to a pending case).

decision of that claim," 448 U.S. at 405, and "is distinguishable from the proviso to this Court's appellate jurisdiction held unconstitutional in *Klein*," *id.* at 407. Here, as in *Sioux Nation*, Congress has not attempted to determine the outcome of litigation between private parties involving Section 10(b); it has left the merits for adjudication by the courts. Because Section 27A(a) does not "prescribe a rule for the decision of a cause in a particular way," *Klein*, 80 U.S. at 146, it does not transgress the limitations described in *Klein*.

2. Petitioner also argues (Pet. 18-20) that Section 27A(a) unconstitutionally overrules the Court's determination that its decision in *Lampf* should be applied retroactively. Petitioner contends that, under *James B. Beam Distilling Co.* v. *Georgia*, *supra*, "the judiciary has the exclusive responsibility for deciding under what circumstances judicial decisions shall be applied to litigants already in the judicial system." Pet. 19. Accordingly, petitioner concludes (Pet. 20) that Section 27A(a) interferes with the Article III powers of this Court and exceeds Congress's authority.

Whatever limits may constrain Congress's power to affect the retroactivity of a *constitutional* holding of this Court, Congress has full authority to determine the retroactivity of a *statutory* holding, as an incident of its Article I authority to define the scope of statutory rights. In *Beam*, the majority, in four separate opinions, rejected the doctrine of selective prospectivity for judicial decisions, ruling that, if an interpretation of federal law is applied to the parties in the case in which it is announced, that interpretation will be applied to pending and future cases

involving the same issue.[10] The Court adopted that rule in its opinion in *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). The Court explained that the substantive law does not "shift and spring" based on the equities of particular litigants and that its holding "heeds the admonition" that the Court lacks "constitutional authority * * * to disregard current law or to treat similarly situated litigants differently." *Harper*, 113 S. Ct. at 2517-2518 (internal quotation marks omitted).

The considerations that prompted the Court to reject selective prospectivity in *Beam* and *Harper* reflect limitations on the judicial function—not the legislative function.[11] As one Justice noted in *Beam*, selective prospectivity is contrary to "the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court." 111 S. Ct. at 2450

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[10] *Beam*, 111 S. Ct. at 2441-2448 (Souter, J., joined by Stevens, J.); *id.* at 2448 (White, J., concurring in the judgment); *id.* at 2449-2450 (Blackmun, J., joined by Marshall and Scalia, JJ., concurring in the judgment); *id.* at 2450 (Scalia, J., joined by Marshall and Blackmun, JJ., concurring in the judgment).

[11] In *Beam*, only three Justices expressed the view that the rule against selective prospectivity is constitutionally based. 111 S. Ct. at 2449-2450 (Blackmun, J., joined by Marshall and Scalia, JJ., concurring in the judgment); *id.* at 2450 (Scalia, J., joined by Marshall and Blackmun, JJ., concurring in the judgment). In *Harper*, the Court suggested that the rule has constitutional overtones, but did not explicitly rest its decision on constitutional grounds. Even assuming that *Harper* is constitutionally grounded, however, the grounds for that decision rest on Article III and the constitutional authority of the courts, 113 S. Ct. at 2517-2518, not constitutional limits on Congress.

(Blackmun, J., concurring in the judgment). Yet, courts do not offend that principle by giving effect to *legislation* that has the effect of limiting the retroactive impact of a statutory holding. It is integral to the judicial function to give effect to changes in the law that affect pending cases. *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Bradley* v. *School Bd.*, 416 U.S. 696, 711 (1974). To do otherwise would require the courts to apply a rule of law that Congress has rejected, in defiance of Congress's power to establish the governing standards.

The point of *Beam* and *Harper* is that courts must apply the law as they find it evenhandedly to similarly situated litigants; nothing in those cases suggests that Congress lacks the power to change the law. While courts may not draw distinctions between parties that are not found in the applicable law itself, and therefore must observe "the principle that litigants in similar situations should be treated the same," *Beam*, 111 S. Ct. at 2444 (Souter, J.), Congress has the authority to draw rational distinctions among the persons who may be subject to the law and to make those distinctions binding in pending cases. And once Congress does so, *Beam* and *Harper* do not suggest that courts are constitutionally compelled to disregard those changes. As the Court noted in *Harper*, the judiciary lacks constitutional authority "to disregard *current* law." 113 S. Ct. at 2517 (emphasis added).

Nor is any question raised in this case regarding the constitutionality of Section 27A(a) because it requires courts to employ the "principles of retroactivity" found in the jurisdiction's laws as of June 19, 1991, 15 U.S.C. 78aa-1(a) (Supp. III 1991), and because

some courts have implemented that provision by applying the retroactivity test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). See Pet. 12. The "principles of retroactivity" clause was not applied in this case. That clause applies in those circuits that had adopted a federal limitations rule before *Lampf*. See *Lampf*, 111 S. Ct. at 2781 (noting that the Second, Third, and Seventh Circuits had previously adopted a federal rule). In those circuits, Section 27A(a) requires the courts to determine whether the federal limitations rule adopted in that circuit should be applied retroactively. See 137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Because the Eleventh Circuit had not adopted a new federal limitations rule as of June 19, 1991, Section 27A(a) does not call into play "principles of retroactivity" in that circuit. In any event, this Court rejected *Chevron Oil* as a *judicially fashioned* means of determining the retroactive effect of its decisions. *Harper*, 113 S. Ct. at 2516, n.9. That holding does not preclude Congress from directing courts to draw on their previously established rules of retroactivity, based on *Chevron Oil* or some other standard, in identifying the litigants whose reasonable expectations under prior law will be protected. Cf. *Heckler* v. *Mathews*, 465 U.S. 728 (1984). Congress's power to determine which litigants will be governed by a particular limitations period for a statutory cause of action embraces the power to determine whether and how new interpretations of those limitations periods should be applied retroactively. Because *Beam* and *Harper* do not limit the power of Congress to prescribe the retroactive operation of statutes, those cases do not affect Section 27A(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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